



STATE OF WISCONSIN Division of Hearings and Appeals

In the Matter of

Sawyer County Human Services, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 206602

Pursuant to petition filed October 19, 2022, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Sawyer County Human Services to disqualify ██████████ from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on Thursday, January 5, 2023 at 10:00 AM at Appleton, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Sawyer County Human Services
10610 Main Street
PO Box 730
Hayward, WI 54843

Respondent:

██████████
██████████
██████████

ADMINISTRATIVE LAW JUDGE:

Beth Whitaker
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # ██████████) is a resident of Outagamie County who received FS benefits in Outagamie County from June 12, 2022 through August 31, 2022.
2. On December 10, 2021, respondent applied for FS benefits by telephone and was found eligible effective the same day as an assistance group of one person.

3. On December 13, 2021, an Enrollment and Benefits booklet was sent to respondent by email.
4. On April 12, 2022 respondent completed a FS renewal by telephone.
5. On April 13, 2022, the agency issued to respondent a summary of information he provided in the renewal and instructed him to report anything that was incorrect.
6. On April 13, 2022, the agency issued to respondent an About Your Benefits notice, informing him that he was eligible for FS.
7. On June 10, 2022, petitioner was incarcerated in the [REDACTED]
8. On July 12, 2022 and at least three other later dates [REDACTED] used respondent's FS card to make purchases at Kwik Trip.
9. On August 17, 2022, the agency learned that respondent was incarcerated.
10. On September 30, 2022, [REDACTED] stated by telephone that she was respondent's mother and that he gave her permission to use his FS EBT card and provided the PIN and card to her. She stated that respondent was not supposed to be in jail "this long"
11. On October 4, 2022 [REDACTED] waived her right to a hearing regarding her own disqualification from the FS program for an IPV.
12. On October 20, 2022, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that respondent transferred FS benefits to his mother while he was incarcerated.
13. The respondent failed to appear for the scheduled January 5, 2023 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.

DISCUSSION

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts;
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

FoodShare Wisconsin Handbook, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

7 C.F.R. §273.16(e)(4) provides that the hearing shall proceed if the respondent cannot be located or fails to appear without good cause. The respondent did not appear or claim a good cause reason for not attending the hearing. Therefore, I must determine whether the respondent committed an IPV based solely on the evidence that the petitioner presented at hearing.

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

Kuehn, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence a firm conviction as to the existence of each of the two elements even though there may be a reasonable doubt as to their existence.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See, *John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

The agency proved that [REDACTED] used petitioner’s FS card while he was incarcerated and while she was not a member of his FS assistance group. At that time, [REDACTED] was receiving FS benefits on her own case with her husband. [REDACTED] later admitted her violation of FS rules, waived the IPV hearing and was disqualified from the program. The agency is required to show intent on the part of [REDACTED]. There is no evidence, other than [REDACTED] recorded telephonic statements in September 2022, to show how she got the FS card and PIN and that it was with [REDACTED] knowledge and consent. [REDACTED] was subject to disqualification for her own actions and had a motive to blame others for her actions to avoid that negative consequence. [REDACTED] was not available for cross-examination. Also, even if [REDACTED] did give [REDACTED] his EBT card and PIN, he may not have violated FS rules. [REDACTED] began using his FS card on July 12, 2022, about 32 days after he was incarcerated. It is plausible that his communication with her was within 30 days of his incarceration date and that he instructed her to purchase the food for his use, not hers, believing that he would be released within 30 days. The agency worker did not ask [REDACTED] when [REDACTED] gave her the card and PIN. [REDACTED] did state that [REDACTED] was not supposed to be in jail as long as he was. The agency made no effort to interview [REDACTED] and no statement from

him was contained in this hearing record. The agency has to prove by clear and convincing evidence that the rule violation was intentional. It failed to do so in this case.

Based upon the record before me, I find that the petitioner has established by clear and convincing evidence that the respondent intentionally violated FS program rules, and that this violation was the first such violation committed by the respondent. Therefore, the petitioner correctly seeks to disqualify the respondent from the FS program for one year.

CONCLUSIONS OF LAW

For the reasons discussed above, there is no clear and convincing evidence that the respondent intended to commit an IPV.

NOW, THEREFORE, it is ORDERED

That the petitioner's determination of an intentional program violation is reversed, and the petition for review is hereby dismissed.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

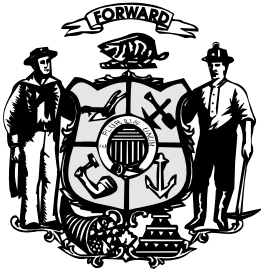
The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 11th day of January, 2023



\sBeth Whitaker
Administrative Law Judge
Division of Hearings and Appeals

c: Northern Consortium - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
Heidi Hagen - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
5th Floor North
4822 Madison Yards Way
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAMail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on January 11, 2023.

Sawyer County Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]